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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 307

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; *et als., Appellants,*

v.

RICHARD SINCOCK, *et als,*

Appeal from the United States District Court for the District of Delaware

MOTION TO ADVANCE
AND
BRIEF IN OPPOSITION TO THE MOTION TO AFFIRM

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Appellants move the Court, pursuant to Rule 43(4), to advance the hearing of the above-entitled cause so that it may be heard immediately following *W.M.C.A. Inc.* v. *Simon*, No. 20; *Reynolds* v. *Sims*, No. 23; *Vann* v. *Frink*, No. 27; *Maryland Committee &c.* v. *Tawes*, No. 29; *McConnell* v. *Frink*, No. 41; and *Davis* v. *Mann*, No. 69, in

all of which probable jurisdiction was noted on June 10, 1963.

The grounds for this motion sufficiently appear in Appellants' Brief in Opposition to the Motion to Affirm, which follows:

First. The thrust of the argument in the 25-page brief supporting the motion to affirm is that the issue primarily emphasized in our Jurisdictional Statement, whether area apportionment of the upper house of a State Legislature violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, is not even in the case (Br. 2, 12-13, 14-18, 22).

In view of the decree and injunction of the court below, that argument is demonstrably untenable.

The decree (J.S. App. A68) declares invalid and unconstitutional the 1963 amendment to the Delaware Constitution, under which each county in Delaware became entitled to 7 senators (Sections 1-4; J.S. App. A78-A79). Moreover, the injunction below (J.S. App. A69-A70) would, had it not been stayed by the Circuit Justice, have prevented any elections to fill vacancies in the Senate, inasmuch as it enjoined all elections to all of the General Assembly under the 1897 constitution as well as under the 1963 amendment thereto.

Plainly, therefore, the issue of area apportionment of the upper house of a State legislature is inescapably in this case. Other issues are present too, but those are adequately set forth in our Jurisdictional Statement and need not be further discussed here.

Second. If a more detailed exposition of the presence of the Senate apportionment issue herein is deemed necessary, it can easily be provided.

Two judges below held violative of the Equal Protection Clause any apportionment of a State senate that did not

give major weight to population, Judge Biggs (J. S. App. A42-A50) giving his reasons for so holding at some length. Judge Wright concurred, saying (J. S. App. A62-A63):

> "I agree with my Brother Biggs' precatory observation that the Senate must be based substantially on population. But all other factors accepted in the majority opinion as justification for deviation from the population principle may be invoked so long as the majority principle is adhered to."

The foregoing concurrence in Judge Biggs' views constitutes, very plainly, a majority of the court below in support of the proposition that any apportionment of a State senate that does not give primary weight to the population factor offends the Equal Protection Clause. Accordingly, under that holding, any plan that reapportioned the Delaware Senate on the basis of equal representation for each of the State's three counties would be unconstitutional, even though the population of every senatorial district within each county were mathematically identical with the population of every other senatorial district in the same county.

Judge Layton, the third member of the court below, dissented as to the State senate (J. S. App. A63-A67), and concurred in the result on a narrow ground (J. S. App. A67):

> "* * * I concur in the result reached by the majority in holding that the State Senate as created by the 1963 Amendment to Art. 2 Sec. 2 of the Constitution must fall but upon the single ground that the Amendment, containing no severability clause, the entire Act must fall."

But this, very plainly, was a dissent; it was in no sense the holding of the district court. For the majority of the court did not rest their views on any principles of non-separability.

Our reading of what was actually held by the court below has the weighty concurrence of the Circuit Justice, who, overruling that court, stayed the operation of its injunction. He said (letter to counsel, June 27, 1963):

> "There are a number of cases now pending before the Court to be argued in November which involve issues substantially the same as those to be presented in this case. • • •"

The Circuit Justice's analysis of the present case is even more significant in view of the contention made before him by the appellees, at p. 27 of their 42-page "Answer of Plaintiffs in Opposition to the Application for a Stay Pending Appeal," that "the adjudication of the Court below can be made to rest on findings other than its determination as to the validity of the apportionment of the senate."

But we are dealing with substance, not with debating points.

The fallacy of appellees' contention that area apportionment of the Delaware Senate is not an issue in the present case is two-fold:

One, appellees' contention finds the holding of the court below in Judge Layton's dissent, an obvious misreading of the several opinions.

Two, appellees refuse to face up to the circumstance that, on the basis of the holding below declaring area apportionment of a State senate to be offensive to the Federal Constitution, no plan of redistricting within a county, even one completely equalizing with absolute mathematical exactitude the districts within each county, could ever pass muster under the district court's interpretation of the Equal Protection Clause.

In short, appellees' motion to affirm asks this Court to rule that the indispensable guideline laid down by the court below for any future reapportionment of the Dela-

ware Senate is not in this case at all. We submit that this dominant guideline, which necessarily will have great influence on the future structure of Delaware's government unless this Court intervenes, cannot be wished out of this case simply because appellees are, understandably enough, reluctant to defend in its entirety the district court's Design for Delaware.

Third. The circumstances that this basic issue of area representation for State senates has already been set for argument here, in the six cases noted above which reached divergent results below, and that the same issue is still being decided with varying answers elsewhere (e.g., *Caesar* v. *Williams*, 371 P. 2d 241 (Idaho); *Sweeney* v. *Notte*, 183 A. 2d 296 (R. I.); *Nolan* v. *Rhodes*, 31 U.S. Law Week 2641 (S.D. Ohio); *Moss* v. *Burkhart*, 32 U.S. Law Week 2077 (W.D. Okla.); *Lisco* v. *Love*, 32 U.S. Law Week 2076 (D. Colo.); *Meyers* v. *Thigpen*, 211 F. Supp. 826 (W.D. Wash.), pending on appeal, No. 381; *Sobel* v. *Adams*, 214 F. Supp. 811 (S.D. Fla.), pending on appeal *sub nom. Swann* v. *Adams*, No. 297), sufficiently demonstrate the substantiality of that issue, without further argument or even additional comment.

Fourth. We urge again that this Court set down the present case for argument with the other cases involving area apportionment of State senates, because this appeal adduces materials for decision, not presented or even mentioned in any of the other pending cases, that should be weighed and fully considered before any guidelines for or generalizations concerning the constitutional requirements for the composition of State senates are formulated.

One. We urge that this Court weigh carefully the unique history of Delaware, the first State to ratify the Constitution of the United States, lest it make sweeping pronouncements regarding the relationships of States and their counties, that, however, correctly they may set forth the devolution and development of the other States of the Union, would be plainly erroneous in the case of Delaware.

A typical such pronouncement underlies the currently held assumption of numerous practitioners of political science that the Federal analogy of equal representation in the United States Senate is inherently inapplicable, and hence unconstitutional, when followed in the governmental structures of the several States. See, e.g., *One Man—One Vote* (The Twentieth Century Fund, 1962) 9, where it is said: "Thus the Senate was a condition of union among a group of states which the Federal Government created by that union has no power to destroy. Counties, by contrast, were never independent or sovereign. They did not create the states but were created by them."

This facile generalization is demonstrably untrue of Delaware. There, as we have shown, somewhat summarily (J.S. 18-19), the counties *were* sovereign, and did create the State. Prior to the Declaration of Independence, the Three Lower Counties upon Delaware were a semi-autonomous part of Pennsylvania. Thus, the enacting clause of legislation just before the Revolution read as follows (1 *Laws of the State of Delaware* [1797] 564, Act of March 29, 1775):

> "Be it enacted by the honorable John Penn esq. with his Majesty's royal approbation, Governor and Commander in Chief of the counties of New-Castle, Kent, and Sussex, upon Delaware, and province of Pennsylvania, by and with the advice and consent of the Representatives of the freemen of the said counties in General Assembly met, and by authority of the same—"

It was not until a Convention met at New Castle in August 1776, "in pursuance of a recommendation of the House of Assembly, made at a session thereof in July last", that, on September 20, 1776, a Constitution was adopted, whose first article (1 Thorpe, *The Federal and State Constitutions* [H.R. Doc. 357, 59th Cong., 2d sess.] 562) provided that—

> "The government of the counties of New-Castle, Kent and Sussex, upon Delaware, shall hereafter in

all public and other writings be called, *The Delaware State.*"

Until then, there was no Delaware State; until then, as contemporaneous writings, including the Adams and Jefferson papers, show, there were only the Lower Counties. See J.S. 14-15; 2 *Diary and Autobiography of John Adams* (Butterfield ed. 1961) 114, 121, 189, 190, 193, 204, 206, 207; 1 *The Papers of Thomas Jefferson* (Boyd ed.) 182, 310, 311, 314.

Consequently, to generalize that "Counties, by contrast, were never independent or sovereign" is simply to demonstrate once again the inherent fallibility of generalizations.

Two. Up to now, no other case has presented or considered, in arguing or construing the Equal Protection Clause in the present connection, the views of those who first construed that Clause when engaged in scrutinizing the new constitutions of the former Confederate States prior to readmitting them to the Union. We have shown that, in 1868, after Congress had imposed as condition precedent to reentry into the Union the requirement that States seeking readmission ratify the Fourteenth Amendment, it readmitted two States whose new constitutions provided schemes of Senate reapportionment based solely on counties. Those Congressional views, duly expressed on the statute book, constitute a contemporaneous exercise of the power of Congress to enforce the Fourteenth Amendment under Section 5 of that Amendment, and accordingly constitute peculiarly meaningful testimony as to its meaning. See J. S. 24-28, which summarizes succinctly a portion, but only a portion, of the available materials.

We recognize, of course, that Congressional views of the scope of the Equal Protection Clause enacted into law in 1868 do not necessarily fix its meaning irrevocably for the future, however much those views emphasize how drastically the holding of the majority of the court below undertook to amend that Clause. But, as this Court has thrice

said, "We do not write upon a clean slate." *Abbate* v. *United States*, 359 U.S. 187, 190; *Lee v. Madigan*, 358 U.S. 228, 232; *Green* v. *United States*, 356 U.S. 165, 187. At a very minimum, therefore, the Court should not undertake to construe the Equal Protection Clause in an area of entirely novel judicial impression—the present point was expressly reserved in *Gray* v. *Sanders*, 372 U.S. 368, 376—without the fullest consideration of all of the available contemporaneous materials. As we say, none of these has been heretofore presented, much less evaluated; and assuredly this aspect of the Equal Protection Clause cannot be appropriately considered simply as a matter of fiat resting on individualized views of what may seem most desirable as a matter of governmental structure or policy.

Fifth. We had earlier urged (J.S. 29) that this case "should be set down for argument with, or very shortly after, the other reapportionment cases involving the composition of State senates."

For it is far less difficult to arrive at a correct conclusion in the first instance, even in the most baffling situations, after considering all of the relevant materials, than it is to formulate a conclusion after study of only some of the materials, and then to be required to amend, to modify, to qualify, perhaps indeed to withdraw portions or passages of what was first proclaimed with full assurance of its soundness.

We are prepared to file our brief by November 9, before the arguments in the other cases involving area representation in State senates are now scheduled to commence. This would enable the appellees herein to be fully apprised of our views several days before argument in this case could be heard, so that their brief would be ready for the argument. If deemed necessary in order to meet this accelerated schedule, we would, if required by the Court, waive any further reply; or, alternatively, we would file our reply brief within a few days after the argument. In any event,

since the Appendices to our Jurisdictional Statement contain all of the opinions below, the last of which includes the findings of fact and conclusions of law, the bulk of the materials for decision is already in print. The complaint with amendments and the pretrial order could easily be printed while the briefs are being prepared. The balance of the record designated by the parties could then be made available in printed form soon after argument.

CONCLUSION

For the reasons set forth above, we respectfully submit that probable jurisdiction of the present appeal should be noted, and that this motion to advance should be granted.

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